

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **SOUTHERN DIVISION**

11 BOSTON SCIENTIFIC CORPORATION  
12 and  
13 BOSTON SCIENTIFIC SCIMED, INC.

14 Plaintiffs,

15 v.

16 EDWARDS LIFESCIENCES  
17 CORPORATION,

18 Defendant.  
19

Case No. 8:16-cv-0730-CJC-GJS

**[DISCOVERY MATTER]**

**PROTECTIVE ORDER ENTERED  
ON STIPULATION OF THE  
PARTIES<sup>1</sup>**

***SEE CHANGES MADE BY THE  
COURT (UNDERLINED AND  
ITALICIZED)***

20 Pursuant to Federal Rule of Evidence 26(c) and to facilitate the production and  
21 receipt of information in discovery in this action, Plaintiffs Boston Scientific  
22 Corporation and Boston Scientific Scimed, Inc. (collectively, “Boston Scientific”)  
23 and Defendant Edwards Lifesciences Corporation (“Edwards”) have agreed and  
24 stipulated, through their respective counsel, to the entry of an order for the protection  
25 of trade secret, proprietary, and other confidential research, development, financial,  
26  
27  
28

---

1 business, or commercial information that may be produced or otherwise disclosed by  
2 them during the course of this action.

3 Upon consideration of the record and proceedings herein, the parties hereby  
4 stipulate to the following terms:

5 **1. PURPOSES AND LIMITATIONS**

6 Disclosure and discovery activity in this action are likely to involve production  
7 of confidential, proprietary, or private information for which special protection from  
8 public disclosure and from use for any purpose other than those specifically set forth  
9 in this Order may be warranted. The parties acknowledge that this Order does not  
10 confer blanket protections on all disclosures or responses to discovery and that the  
11 protection it affords from public disclosure and use extends only to the limited  
12 information or items that are entitled to confidential treatment under the applicable  
13 legal principles.

14 **2. GOOD CAUSE STATEMENT**

15 This action is likely to involve trade secrets, customer and pricing lists and  
16 other valuable research, development, commercial, financial, technical and/or  
17 proprietary information for which special protection from public disclosure and from  
18 use for any purpose other than prosecution of this action is warranted. Such  
19 confidential and proprietary materials and information consist of, among other things,  
20 confidential business or financial information, information regarding confidential  
21 business practices, or other confidential research, development, or commercial  
22 information (including information implicating privacy rights of third parties),  
23 information otherwise generally unavailable to the public, or which may be privileged  
24 or otherwise protected from disclosure under state or federal statutes, court rules, case  
25 decisions, or common law. The parties stipulate that disclosure of this information  
26 would cause competitive harm to the parties. For example, the parties believe that  
27 competitors will gain an unfair advantage if they learn the parties' Protected Material,  
28 such as financial information, accounting information, customer lists, vendor lists,

costs or profits structure, sales information, product lines, business and marketing strategy or information about operations. Accordingly, to expedite the flow of information, to facilitate the prompt resolution of disputes over confidentiality of discovery materials, to adequately protect information the parties are entitled to keep confidential, to ensure that the parties are permitted reasonable necessary uses of such material in preparation for and in the conduct of trial, to address their handling at the end of the litigation, and serve the ends of justice, a protective order for such information is justified in this matter. It is the intent of the parties that information will not be designated as confidential for tactical reasons and that nothing be so designated without a good faith belief that it has been maintained in a confidential, non-public manner, and there is good cause why it should not be part of the public record of this case.

### **3. ACKNOWLEDGMENT OF PROCEDURE FOR FILING UNDER SEAL**

The parties further acknowledge, as set forth in Section 15.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Local Civil Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

There is a strong presumption that the public has a right of access to judicial proceedings and records in civil cases. In connection with non-dispositive motions, good cause must be shown to support a filing under seal. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006), *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002), *Makar-Welbon v. Sony Electronics, Inc.*, 187 F.R.D. 576, 577 (E.D. Wis. 1999) (even stipulated protective orders require good cause showing), and a specific showing of good cause or compelling reasons with proper evidentiary support and legal justification, must be made with respect to Protected Material that a party seeks to file under seal. The parties' mere designation of Disclosure or Discovery Material as Protected Material does not—without the

1 submission of competent evidence by declaration, establishing that the material  
 2 sought to be filed under seal qualifies as confidential, privileged, or otherwise  
 3 protectable—constitute good cause.

4 Further, if a party requests sealing related to a dispositive motion or trial, then  
 5 compelling reasons, not only good cause, for the sealing must be shown, and the  
 6 relief sought shall be narrowly tailored to serve the specific interest to be protected.  
 7 *See Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 677-79 (9th Cir. 2010). For each  
 8 item or type of information, document, or thing sought to be filed or introduced under  
 9 seal in connection with a dispositive motion or trial, the party seeking protection must  
 10 articulate compelling reasons, supported by specific facts and legal justification, for  
 11 the requested sealing order. Again, competent evidence supporting the application to  
 12 file documents under seal must be provided by declaration.

13 Any document that is not confidential, privileged, or otherwise protectable in  
 14 its entirety will not be filed under seal if the confidential portions can be redacted. If  
 15 documents can be redacted, then a redacted version for public viewing, omitting only  
 16 the confidential, privileged, or otherwise protectable portions of the document, shall  
 17 be filed. Any application that seeks to file documents under seal in their entirety  
 18 should include an explanation of why redaction is not feasible.

#### 19 **4. DEFINITIONS**

20 4.1 Delaware Action: *Boston Scientific Corporation v. Edwards*  
 21 *Lifesciences Corporation*, No. 16-275-SLR (D. Del.).

22 4.2 Delaware Party: a party to the Delaware Action.

23 4.3 Challenging Party: a Party or Non-Party that challenges the designation  
 24 of information or items under this Order.

25 4.4 “CONFIDENTIAL” Information or Items: information (regardless of  
 26 how it is generated, stored, or maintained) or tangible things that qualify for  
 27 protection under Federal Rule of Civil Procedure 26(c), and as specified above in the  
 28 Good Cause Statement.

1           4.5    Counsel (without qualifier): Outside Counsel of Record and In-House  
2 Counsel (as well as their support staff).

3           4.6    Designated In-House Counsel: In-House Counsel who seek access to  
4 “HIGHLY CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’  
5 EYES ONLY” information in this matter who have responsibility for maintaining,  
6 defending, or evaluating this action, including their administrative and support staff,  
7 designated pursuant to Paragraph 9.3(b).

8           4.7    In-House Counsel: attorneys who are employees of a party to this  
9 action. In-House Counsel does not include Outside Counsel.

10          4.8    Designating Party: a Party or Non-Party that designates Disclosure or  
11 Discovery Material as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL,” or  
12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

13          4.9    Disclosure or Discovery Material: all items or information, regardless of  
14 the medium or manner in which it is generated, stored, or maintained (including,  
15 among other things, testimony, transcripts, and tangible things), that are produced or  
16 generated for purposes of litigation in this matter, including documents, data and  
17 information, answers to interrogatories, answers to deposition questions, responses to  
18 requests for admission, affidavits, expert reports, any information copied or extracted  
19 therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus  
20 testimony, conversations or presentations by parties or counsel to or in court or in  
21 other settings.

22          4.10   Expert: a person with specialized knowledge or experience in a matter  
23 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve  
24 as an expert witness or as a consultant in this action or the Delaware Action, (2) is not  
25 a current employee of a Party or a Delaware Party and (3) at the time of retention, is  
26 not anticipated to become an employee of a Party, a Party’s competitor, a Delaware  
27 Party, or a Delaware Party’s competitor.  
28

1           4.11 “HIGHLY CONFIDENTIAL –ATTORNEYS’ EYES ONLY” or  
 2 “HIGHLY CONFIDENTIAL” Information or Items: Extremely sensitive  
 3 “Confidential Information or Items,” the disclosure of which to another Party or Non-  
 4 Party would create a substantial risk of serious harm that could not be avoided by less  
 5 restrictive means. It includes, without limitation, (1) highly sensitive settlement  
 6 and/or licensing agreements (including drafts thereof) that are subject to a third-party  
 7 confidentiality agreement requiring Attorneys’ Eyes Only designation; (2) highly  
 8 sensitive corporate strategy data; (3) highly sensitive product information containing  
 9 information not available to competitors or the public concerning present products,  
 10 anticipated products or products in development; (4) pending but unpublished patent  
 11 applications; and (5) other highly confidential technical, research and development,  
 12 and financial information. Materials or information designated as “HIGHLY  
 13 CONFIDENTIAL” will be treated the same as “HIGHLY CONFIDENTIAL –  
 14 ATTORNEYS’ EYES ONLY” under the provisions of this Protective Order and vice  
 15 versa.

16           4.12 Non-Party: any natural person, partnership, corporation, association, or  
 17 other legal entity not named as a Party to this action.

18           4.13 Outside Counsel (without qualifier): attorneys and their support staff  
 19 who are not employees of a party to this action or the Delaware Action and who (i)  
 20 have appeared in this action or the Delaware Action on behalf of such party or (ii) are  
 21 employed with a law firm which has appeared on behalf of that party.

22           4.14 Party: any party to this action, including all of its officers, directors,  
 23 employees, consultants, retained experts, and Outside Counsel of Record (and their  
 24 support staffs).

25           4.15 Producing Party: a Party or Non-Party that produces Disclosure or  
 26 Discovery Material in this action.

27           4.16 Professional Vendors: persons or entities that provide litigation support  
 28 services (*e.g.*, photocopying, videotaping, translating, preparing and reviewing

discovery material, exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

4.17 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

4.18 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

## 5. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including information that has become part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party.

The Parties have agreed that they are contractually bound by the obligations to which they have stipulated as set forth in this this Protective Order in perpetuity.  
**However, any use of Protected Material at trial shall be governed by the orders of the trial judge. This Order does not govern the use of Protected Material at trial.**



## 6. DURATION

Once a case proceeds to trial, information that was designated as CONFIDENTIAL or maintained pursuant to this protective order **that is used or introduced as an exhibit at trial** becomes public and will be presumptively available to all members of the public, including the press, unless compelling reasons supported by specific factual findings to proceed otherwise are made to the trial judge in advance of the trial. See *Kamakana*, 447 F.3d at 1180-81 (distinguishing “good cause” showing for sealing documents produced in discovery from “compelling reasons” standard when merits-related documents are part of court record). Accordingly, the terms of this protective order do not extend beyond the commencement of the trial.

5. With the exception set forth above for material used at trial, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. For purposes of terms of this agreement that are triggered by “Final Disposition” of the action (see below), “Final disposition” shall be deemed to be the later of: (1) dismissal of all claims and defenses in this action, with or without prejudice; or (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including expiration of the time limits for filing any motions or applications for extension of time pursuant to applicable law.

## 7. DESIGNATING PROTECTED MATERIAL

### 7.1 Exercise of Restraint and Care in Designating Material for Protection.

Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material, documents, items, or



1 oral or written communications that qualify – so that other portions of the material,  
 2 documents, items, or communications for which protection is not warranted are not  
 3 swept unjustifiably within the ambit of this Order.

4 Mass, indiscriminate or routinized designations are prohibited. Designations  
 5 that are shown to be clearly unjustified or that have been made for an improper  
 6 purpose (e.g., to unnecessarily encumber the case development process or to impose  
 7 unnecessary expenses and burdens on other parties) may expose the Designating  
 8 Party to sanctions.

9 If it comes to a Designating Party’s attention that information or items that it  
 10 has designated for protection do not qualify for any protection or do not qualify for  
 11 the level of protection initially asserted, that Designating Party must promptly notify  
 12 all other parties that it is withdrawing or altering the mistaken designation.

13 7.2 Manner and Timing of Designations. Except as otherwise provided in  
 14 this Order (*see, e.g.*, second paragraph of section 7.2(a) below), or as otherwise  
 15 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection  
 16 under this Order must be clearly so designated before the material is disclosed or  
 17 produced.

18 Designation in conformity with this Order requires:

19 (a) for information in documentary form (*e.g.*, paper or electronic  
 20 documents, but excluding transcripts of depositions or other pretrial or trial  
 21 proceedings), that the Producing Party affix the legend “CONFIDENTIAL,”  
 22 “HIGHLY CONFIDENTIAL,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’  
 23 EYES ONLY” to each page of the document that contains protected material.

24 A Party or Non-Party that makes original documents or materials available for  
 25 inspection need not designate them for protection until after the inspecting Party has  
 26 indicated which material it would like copied and produced. During the inspection  
 27 and before the designation, all of the material made available for inspection shall be  
 28 deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the

1 inspecting Party has identified the documents that it wishes to have copied and  
 2 produced, the Producing Party must determine which documents, or portions thereof,  
 3 qualify for protection under this Order. Then, before producing the specified  
 4 documents, the Producing Party must affix the appropriate legend  
 5 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –ATTORNEYS’ EYES  
 6 ONLY”) to each page of the document that contains Protected Material.

7 (b) for transcripts of depositions or other pretrial or trial proceedings,  
 8 at the request of any party, the original and all copies of any transcript, in whole or in  
 9 part, shall be marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
 10 ATTORNEYS’ EYES ONLY” by the court reporter. This request may be made  
 11 orally during the proceeding or in writing within fifteen (15) days of the proceeding.  
 12 Deposition transcripts shall be treated by default as “HIGHLY CONFIDENTIAL –  
 13 ATTORNEYS’ EYES ONLY” until the expiration of the time to make a  
 14 confidentiality designation. Any portions so designated shall thereafter be treated in  
 15 accordance with the terms of this Order.

16 Transcripts containing Protected Material shall have an obvious legend with the  
 17 appropriate designation on the title page and every subsequent page that the transcript  
 18 contains Protected Material. If only portions of a transcript are designated as  
 19 Protected Material, then the title page shall be followed by a list of all pages  
 20 (including line numbers as appropriate) that have been designated as Protected  
 21 Material and the level of protection being asserted by the Designating Party. The  
 22 Designating Party shall inform the court reporter of these requirements.

23 (c) for information produced in some form other than documentary  
 24 and for any other tangible items, that the Producing Party affix in a prominent place  
 25 on the exterior of the container or containers in which the information or item is  
 26 stored the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –  
 27 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL.” If only a portion  
 28 or portions of the information or item warrant protection, the Producing Party, to the

1 extent practicable, shall identify the protected portion(s) and specify the level of  
2 protection being asserted.

3       7.3 Failures to Designate. A failure to designate qualified information or  
4 items, whether by inadvertence or otherwise, does not, standing alone, waive in  
5 whole or in part the Designating Party's right to secure protection under this Order  
6 for such material. Upon subsequent correction of a designation, the Receiving Party  
7 must make reasonable efforts to assure that the material is treated in accordance with  
8 any revised designations under the provisions of this Order and promptly collect any  
9 copies of the material that have been provided to individuals other than those  
10 authorized under Paragraph 9 of this Order. The Designating Party may also request  
11 the individuals to execute the "Acknowledgment and Agreement to Be Bound" that is  
12 attached hereto as Exhibit A.

## 13 **8. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

14       8.1 Timing of Challenges. Any Party or Non-Party may challenge a  
15 designation of confidentiality at any time. Unless a prompt challenge to a  
16 Designating Party's confidentiality designation is necessary to avoid foreseeable,  
17 substantial unfairness, unnecessary economic burdens, or a significant disruption or  
18 delay of the litigation, a Party does not waive its right to challenge a confidentiality  
19 designation by electing not to mount a challenge promptly after the original  
20 designation is disclosed.

21       8.2 Meet and Confer. The Challenging Party shall initiate the dispute  
22 resolution process by providing written notice of each designation it is challenging  
23 and describing the basis for each challenge. To avoid ambiguity as to whether a  
24 challenge has been made, the written notice must recite that the challenge to  
25 confidentiality is being made in accordance with this specific paragraph of the  
26 Protective Order. The parties shall attempt to resolve each challenge in good faith  
27 and must begin the process by conferring directly (in voice to voice dialogue; other  
28 forms of communication are not sufficient) within fourteen (14) days of the date of

1 service of notice. In conferring, the Challenging Party must explain the basis for its  
2 belief that the confidentiality designation was not proper and must give the  
3 Designating Party an opportunity to review the designated material, to reconsider the  
4 circumstances, and, if no change in designation is offered, to explain the basis for the  
5 chosen designation. A Challenging Party may proceed to the next stage of the  
6 challenge process only if it has engaged in this meet and confer process first or  
7 establishes that the Designating Party is unwilling to participate in the meet and  
8 confer process in a timely manner.

9 8.3 Judicial Intervention. Subject to Paragraph 8.2, the Challenging Party  
10 shall initiate the dispute resolution process under Local Rule 37.1 et seq.

11 The burden of persuasion in any such challenge proceeding shall be on the  
12 Designating Party. Frivolous challenges, and those made for an improper purpose  
13 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may  
14 expose the Challenging Party to sanctions. Unless the Designating Party has waived  
15 or withdrawn the confidentiality designation, all parties shall continue to afford the  
16 material in question the level of protection to which it is entitled under the Producing  
17 Party's designation until the Court rules on the challenge.

## 18 **9. ACCESS TO AND USE OF PROTECTED MATERIAL**

19 9.1 Basic Principles. A Receiving Party may use Protected Material that is  
20 disclosed or produced by another Party or by a Non-Party in connection with this case  
21 only for prosecuting, defending, or attempting to settle this litigation, the Delaware  
22 Action, or any inter partes review ("IPR") proceeding involving a patent asserted in  
23 this litigation or the Delaware Action. Such Protected Material may be disclosed  
24 only to the categories of persons and under the conditions described in this Order.  
25 When the litigation has been terminated, a Receiving Party must comply with the  
26 provisions of Section 16 below (FINAL DISPOSITION).

1 Protected Material must be stored and maintained by a Receiving Party at a  
2 location and in a secure manner that ensures that access is limited to the persons  
3 authorized under this Order.

4 9.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless  
5 otherwise ordered by the court or permitted in writing by the Designating Party, a  
6 Receiving Party may disclose any information or item designated  
7 “CONFIDENTIAL” only to:

8 (a) the Receiving Party’s Outside Counsel of Record; as well as  
9 employees of said Outside Counsel of Record to whom it is reasonably necessary to  
10 disclose the information for this litigation;

11 (b) the officers, directors, and employees (including In-House  
12 Counsel) for the Receiving Party (1) to whom disclosure is reasonably necessary for  
13 this litigation, and (2) who have signed the “Acknowledgment and Agreement to Be  
14 Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph  
15 9.4(a)(1) below have been followed;

16 (c) Experts (as defined in this Order) of the Receiving Party (1) to  
17 whom disclosure is reasonably necessary for purposes of this litigation, (2) who have  
18 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3) as to  
19 whom the procedures set forth in paragraph 9.4(a)(1) below have been followed;

20 (d) the court and its personnel;

21 (e) court reporters and their staff, including stenographic,  
22 videographic, and clerical personnel;

23 (f) professional jury or trial consultants and mock jurors who have  
24 signed the “Acknowledgment and Agreement to be Bound” (Exhibit A), which does  
25 not need to be disclosed to the Designating Party unless the Court for good cause  
26 orders otherwise;

27 (g) Professional Vendors to whom disclosure is reasonably necessary  
28 for this litigation and who have signed the “Acknowledgment and Agreement to Be

1 Bound” (Exhibit A), which does not need to be disclosed to the Designating Party  
2 unless the Court for good cause orders otherwise;

3 (h) during their depositions or in court proceedings, witnesses in this  
4 action, provided that (1) such documents or information were authored by, addressed  
5 to, or received by such persons or other persons employed by the same entity as such  
6 persons, or (2) such documents or information were produced by or obtained from  
7 such persons or their employer; and

8 (i) the author or recipient of a document containing the information  
9 or a custodian or other person who otherwise possessed or knew the information.

10 9.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
11 ONLY” or “HIGHLY CONFIDENTIAL” Information or Items.

12 Unless otherwise ordered by the Court or permitted in writing by the  
13 Designating Party, a Receiving Party may disclose any information or item  
14 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
15 “HIGHLY CONFIDENTIAL” only to:

16 (a) the Receiving Party’s Outside Counsel of Record; as well as  
17 employees of said Outside Counsel of Record to whom it is reasonably necessary to  
18 disclose the information for this litigation;

19 (b) The following Designated In-House Counsel, upon signing the  
20 “Acknowledgment and Agreement to Be Bound” (Exhibit A):

21 Peter Gafner;

22 Todd Messal;

23 Aimee Weisner;

24 Ryan Lindsey; and

25 Any other Designated In-House Counsel on which the parties  
26 agree;

27 (c) Experts of the Receiving Party (1) to whom disclosure is  
28 reasonably necessary for purposes of this litigation, (2) who have signed the

1 “Acknowledgment and Agreement to Be Bound,” Exhibit A, and (3) as to whom the  
2 procedures set forth in paragraph 9.4(a)(2), below, have been followed.

3 (d) the Court and its personnel;

4 (e) court reporters and their staff, including stenographic,  
5 videographic, and clerical personnel;

6 (f) professional jury or trial consultants and mock jurors who have  
7 signed the “Acknowledgment and Agreement to be Bound” (Exhibit A), which does  
8 not need to be disclosed to the Designating Party unless the Court for good cause  
9 orders otherwise;

10 (g) Professional Vendors to whom disclosure is reasonably necessary  
11 for this litigation and who have signed the “Acknowledgment and Agreement to Be  
12 Bound” (Exhibit A), which does not need to be disclosed to the Designating Party  
13 unless the Court for good cause orders otherwise;

14 (h) during their depositions or in court proceedings, witnesses in the  
15 action, provided that (1) such documents or information were authored by, addressed  
16 to, or received by such persons or other persons employed by the same entity as such  
17 persons, or (2) such documents or information were produced by or obtained from  
18 such persons or their employer; and

19 (i) the author or recipient of a document containing the information  
20 or a custodian or other person who otherwise possessed or knew the information.

21 9.4 Procedures for Approving or Objecting to Disclosure of Protected  
22 Material to officers, directors, and employees of a Receiving Party, or Experts.

23 (a)(1) Unless otherwise ordered by the court or agreed to in writing by  
24 the Designating Party, a Party that seeks to disclose to any officers, directors, or  
25 employees of the Receiving Party or Expert any information or item that has been  
26 designated “CONFIDENTIAL” pursuant to paragraph 9.2(b) or 9.2(c) first must  
27 provide the Designating Party with written notice that (1) includes the proposed  
28 recipient’s signed “Acknowledgement and Agreement to Be Bound” (Exhibit A), (2)



1 sets forth the full name of the proposed recipient and the city and state of his or her  
 2 primary residence, and (3) describes the proposed recipient's current and reasonably  
 3 foreseeable job responsibilities. For purposes of clarity, all requests for disclosures to  
 4 any proposed recipient under this paragraph are subject to Paragraphs 9.4(b) and (c).

5 (a)(2) Unless otherwise ordered by the court or agreed to in writing by  
 6 the Designating Party, a Party that seeks to disclose to an Expert any information or  
 7 item that has been designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES  
 8 ONLY" or "HIGHLY CONFIDENTIAL" pursuant to paragraph 9.3(c) first must  
 9 provide the Designating Party with a written notice that includes (1) the Expert's  
 10 signed "Acknowledgment and Agreement to Be Bound" (Exhibit A), (2) sets forth  
 11 the full name of the proposed recipient and the city and state of his or her primary  
 12 residence; (3) attaches a copy of the proposed recipient's current resume;  
 13 (4) identifies the proposed recipient's current employer(s); (5) identifies each person  
 14 or entity from whom the proposed recipient has received compensation or funding for  
 15 work in his or her areas of expertise or to whom the proposed recipient has provided  
 16 professional services, including in connection with litigation, at any time during the  
 17 preceding five years;<sup>2</sup> and (6) identifies (by name and number of the case, filing date,  
 18 and location of court) any litigation in connection with which the Expert has offered  
 19 expert testimony, including through a declaration, report, or testimony at a deposition  
 20 or trial, during the preceding five years. For purposes of clarity, all requests for  
 21 disclosures to any proposed recipient under this paragraph are subject to Paragraphs  
 22 9.4(b) and (c).

23 (b) A Party that makes a request and provides the information specified  
 24 in the preceding respective paragraphs, Paragraphs 9.4(a)(1) and (2), may disclose the

---

25 <sup>2</sup> If the proposed recipient believes any of this information is subject to a  
 26 confidentiality obligation to a third party, then the proposed recipient should provide  
 27 whatever information the proposed recipient believes can be disclosed without  
 28 violating any confidentiality agreements, and the Party seeking to disclose to the  
 proposed recipient shall be available to meet and confer with the Designating Party  
 regarding any such engagement.

1 subject Protected Material to the identified person after 5 business days from the time  
2 it delivered the request unless, within 5 business days of delivering the request, the  
3 Party receives a written objection from the Designating Party. Any such objection  
4 must set forth in detail the grounds on which it is based and must be made for good  
5 cause. Failure to object within five (5) business days shall constitute approval. The  
6 Parties specifically reserve the right to object to the disclosure of Protected Material  
7 to a proposed Expert should the proposed Expert be employed by the objecting  
8 Party's competitor.

9 (c) A Party that receives a timely written objection must meet and  
10 confer with the Designating Party (through direct voice-to-voice dialogue) to try to  
11 resolve the matter by agreement within seven (7) business days of the written  
12 objection. If no agreement is reached, the Party seeking to make the disclosure may  
13 file a motion seeking permission from the court to do so.

14 In any such proceeding, the Party opposing disclosure to the identified officers,  
15 directors, and employees of a Receiving Party, Designated In-House Counsel, or  
16 Expert shall bear the burden of proving that the risk of harm that the disclosure would  
17 entail (under the safeguards proposed) outweighs the Receiving Party's need to  
18 disclose the Protected Material to its Expert.

19 9.5 Related Foreign Actions. At the time the parties submit this stipulation,  
20 they dispute whether foreign attorneys should be allowed access to Protected  
21 Material, and they have briefed that dispute in the Delaware Action. For consistency  
22 and efficiency reasons, the parties agree to follow in this case the terms of the ruling  
23 in the Delaware Action. Therefore, foreign attorneys will not be allowed access to  
24 Protected Material unless, and until, the court in the Delaware Action resolves the  
25 dispute to allow foreign counsel access to Protected Material. At that point, the  
26 parties shall follow the rules set forth in the Delaware Action regarding providing  
27 Protected Material to foreign attorneys. The rules shall be modified as necessary to  
28 apply the Order to this case (e.g., references from the Delaware court to Exhibit A of

1 the Protective Order shall mean Exhibit A to this Protective Order; references to the  
2 Court shall mean this Court). The parties shall also file a stipulation with this Court  
3 adding a provision to this Order that more specifically describes the rules to allow  
4 foreign attorneys access to Protected Material. Subject to the terms above, the parties  
5 may provide Protected Material to foreign attorneys between the time the Delaware  
6 court issues an order allowing such access and the time this Court enters any  
7 stipulation submitted by the parties concerning the issue.

8       9.6 Unified Production of Documents. For the sake of efficiency, the Parties  
9 agree to a common deposit and unified production of documents in this action and the  
10 Delaware Action. Upon the effective date of the stipulation to this Protective Order  
11 in this action, Outside Counsel of Record may have access to all documents and  
12 things produced in the Delaware or California Actions, as well as to any trial  
13 transcripts, trial exhibits, deposition transcripts, deposition exhibits, expert reports  
14 and briefs filed or served in the Delaware or California actions and use such materials  
15 in either the Delaware or California Actions.

16       Each party agrees that the production of any documents under this paragraph is  
17 not an admission of relevance or admissibility for any given action. Each Party  
18 reserves the right to argue that any document produced under this paragraph and any  
19 trial transcript, trial exhibit, deposition transcript, deposition exhibit, expert report  
20 and/or brief filed or served in the Delaware Action is not relevant or admissible to  
21 this action. Each party agrees not to use this agreement to deem any documents  
22 produced under this paragraph, or any trial transcripts, trial exhibits, deposition  
23 transcripts, deposition exhibits, expert reports and briefs filed or served in the  
24 Delaware Action, as evidence of the relevance or admissibility of any such document  
25 or the relatedness of any legal issues in the Delaware Action with this action.

26       9.7 Re-Production of Document Productions from Other Actions. For the  
27 sake of efficiency, the Parties agree that document productions from other actions  
28 may be produced in this action without the need for separate re-collection and

1 processing of those documents. Such documents will be treated in accordance with  
2 the provisions of this Protective Order as if they had been collected and produced for  
3 this action. Nothing in this provision, however, should be construed as excusing the  
4 Parties from their respective obligations to perform a reasonable search in connection  
5 with this litigation.

#### 6 **10. PROSECUTION BAR**

7 Absent written consent from the Producing Party or an order by the Court,  
8 every person who receives, or in the case of Outside Counsel of Record who receives  
9 and reviews, Prosecution Bar Information is precluded from performing, or providing  
10 (verbally or in tangible form, in whole or in part) such Protected Material received  
11 under this Order to any person involved in performing, the following tasks: drafting,  
12 prosecuting, or supervising or providing advice regarding the drafting or prosecution,  
13 of any patent applications with the United States Patent and Trademark Office  
14 (“USPTO”) or any similar proceedings in any other country, involving any patent or  
15 patent application having claims or disclosures related to transcatheter replacement  
16 heart valves and methods and devices for the delivery thereof. This preclusion is  
17 limited to proceedings involving patents and patent applications having an effective  
18 filing date before this action, during this action, or within two (2) years after the final  
19 termination of this action. For purposes of clarity, “prosecution” does not include  
20 reexamination, reissue, interference proceedings, or equivalent proceedings (e.g.,  
21 post-grant review, inter partes review) and any similar proceedings in any other  
22 country, except that all persons who receive, or in the case of Outside Counsel of  
23 Record who receives and reviews, Prosecution Bar Information are prohibited from  
24 performing, or providing (verbally or in tangible form, in whole or in part) such  
25 Protected Material received under this Order to any person involved in performing,  
26 the following tasks: drafting, or supervising or providing advice regarding drafting,  
27 new or amended claims in any such proceedings. This Paragraph does not apply to  
28 any In-House Counsel designated under Paragraph 9.2(b) who is only provided

1 access to “CONFIDENTIAL” information of an opposing party. This Prosecution  
 2 Bar shall begin when access to Prosecution Bar Information is first received by the  
 3 affected individual, or in the case of Outside Counsel of Record first received and  
 4 reviewed, and shall end two (2) years after final termination of this action. For  
 5 purposes of this paragraph, Prosecution Bar Information is information that is  
 6 designated as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
 7 “HIGHLY CONFIDENTIAL” under this Order, except that Prosecution Bar  
 8 Information does not include financial information.

9 This prohibition shall not prevent Edwards’s Outside Counsel of Record or  
 10 Designated In-House Counsel from supervising or providing advice regarding the  
 11 drafting or prosecution of any patent application that claims priority to any of U.S.  
 12 Patent No. 8,579,964, provisional application No. 61/414,879 filed on Nov. 17, 2010,  
 13 provisional application No. 61/393,860 filed on Oct. 15, 2010, or provisional  
 14 application No. 61/331,799 filed on May 5, 2010.

# 15 **11. PROTECTED MATERIAL SUBPOENAED OR ORDERED** 16 **PRODUCED IN OTHER LITIGATION**

17 If a Party is served with a discovery request, subpoena, or a court order from  
 18 another litigation that compels disclosure of any information or items designated in  
 19 this action as Protected Material, that Party must:

20 (a) promptly notify in writing the Designating Party. Such notification shall  
 21 include a copy of the subpoena or court order;

22 (b) promptly notify in writing the party who caused the subpoena or order to  
 23 issue in the other litigation that some or all of the material covered by the subpoena or  
 24 order is subject to this Protective Order. Such notification shall include a copy of this  
 25 Stipulated Protective Order; and

26 (c) cooperate with respect to all reasonable procedures sought to be pursued  
 27 by the Designating Party whose Protected Material may be affected.  
 28

1 If the Designating Party timely seeks a protective order, the Party served with  
 2 the discovery request, subpoena, or court order shall not produce any information  
 3 designated in this action as Protected Material before a determination by the court  
 4 from which the subpoena or order issued, unless the Party has obtained the  
 5 Designating Party's permission. The Designating Party shall bear the burden and  
 6 expense of seeking protection in that court of its confidential material – and nothing  
 7 in these provisions should be construed as authorizing or encouraging a Receiving  
 8 Party in this action to disobey a lawful directive from another court.

9 **12. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE**  
 10 **PRODUCED IN THIS LITIGATION**

11 (a) The terms of this Order are applicable to information produced by a  
 12 Non-Party in this action and designated as Protected Material. Such information  
 13 produced by Non-Parties in connection with this litigation is protected by the  
 14 remedies and relief provided by this Order. Nothing in these provisions should be  
 15 construed as prohibiting a Non-Party from seeking additional protections.

16 (b) Both Parties shall be treated as a Receiving Party with respect to any  
 17 information produced by a Non-Party in this action. To the extent that a Party obtains  
 18 information from a Non-Party via subpoena or otherwise, the Party shall produce the  
 19 information to the other Party within 5 business days, unless the Party can  
 20 demonstrate good reason why it is not possible to do so.

21 (c) In the event that a Party is required, by a valid discovery request, to  
 22 produce a Non-Party's confidential information in its possession (other than  
 23 information produced in this litigation by a Non-Party), and the Party is subject to an  
 24 agreement with the Non-Party not to produce the Non-Party's confidential  
 25 information, then the Party shall:

26 1. promptly notify in writing the Requesting Party and the Non-Party  
 27 that some or all of the information requested is subject to a confidentiality agreement  
 28 with a Non-Party;

2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

3. make the information requested available for inspection by the Non-Party.

(d) If the Non-Party fails to object or seek a protective order from the Court within fourteen (14) days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

### **13. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

### **14. PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL**

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). In accordance with Federal Rule of Evidence 502(d), the



1 attorney-client privilege or work-product protection is not waived as a result of the  
2 disclosure of information in connection with this litigation through inadvertence or  
3 error. Such production of documents or information subject to attorney-client  
4 privilege, work-product immunity, or any other applicable privilege shall not  
5 constitute a waiver of, nor a prejudice to, any claim that such or related material is  
6 Protected Material, privileged or protected by the work-product immunity or any  
7 other applicable privilege, provided that the Producing Party notifies the Receiving  
8 Party in writing promptly upon discovery of such information. Within five (5)  
9 business days of receiving such notice, the Receiving Party shall return such  
10 information or documents or confirm in writing that it has taken reasonable steps to  
11 permanently delete all electronic copies of such documents from electronic records  
12 and to destroy all paper copies. If the Receiving Party has disclosed the information  
13 to others before being notified of the claim of privilege or protection, the Receiving  
14 Party must take reasonable steps to retrieve and return or destroy the disclosed  
15 information. No use shall be made of such documents or information during  
16 deposition or at trial, nor shall such documents or information be shown to anyone  
17 after the request that they be returned. The Receiving Party may move the court for  
18 an order compelling production of such information (based on information  
19 independent of the content of the allegedly privileged materials in question), but the  
20 motion shall not assert as a ground for production the fact or circumstances of the  
21 inadvertent production. If a claim is disputed, the Receiving Party shall not use or  
22 disclose a document or information for which a claim of privilege or immunity is  
23 made pursuant to this paragraph for any purpose until the matter is resolved by  
24 agreement of the parties or by a decision of this Court. If a party becomes aware that  
25 it has received documents that are clearly privileged, the party receiving the  
26 privileged documents will promptly notify the Producing Party of receipt of the  
27 documents and return or destroy all copies of the privileged documents, if the  
28 Producing Party so requests within 10 days after being advised of the inadvertent

1 production. If the Producing Party does not request return or destruction of the  
 2 identified privileged documents within this 10 day time period, the Producing Party  
 3 will be deemed to have waived the privilege, but only with respect to the specific  
 4 documents identified.

## 5 **15. MISCELLANEOUS**

6 15.1 Right to Further Relief. Nothing in this Order abridges the right of any  
 7 person to seek its modification by the Court in the future.

8 15.2 Right to Assert Other Objections. By stipulating to the entry of this  
 9 Protective Order, no Party waives any right it otherwise would have to object to  
 10 disclosing or producing any information or item on any ground not addressed in this  
 11 Stipulated Protective Order. Similarly, no Party waives any right to object on any  
 12 ground to the use in evidence of any of the material covered by this Protective Order.

13 15.3 Filing Protected Material. A Party that seeks to file under seal any  
 14 Protected Material must comply with Local Civil Rule 79-5. Protected Material may  
 15 only be filed under seal pursuant to a court order authorizing the sealing of the  
 16 specific Protected Material at issue. If a Party's request to file Protected Material  
 17 under seal is denied by the court, then the Receiving Party may file the information in  
 18 the public record unless otherwise instructed by the court.

## 19 **16. FINAL DISPOSITION**

20 Within sixty (60) days after the latest of any final disposition, as defined in  
 21 Section 6, of this action, the Delaware Action, or any IPR proceeding involving a  
 22 patent asserted in this litigation or the Delaware Action, each Receiving Party must  
 23 return all Protected Material to the Producing Party or destroy such material. As used  
 24 in this subdivision, "all Protected Material" includes all copies, abstracts,  
 25 compilations, summaries, and any other format reproducing or capturing any of the  
 26 Protected Material. Whether the Protected Material is returned or destroyed, the  
 27 Receiving Party must submit a written certification to the Producing Party (and, if not  
 28 the same person or entity, to the Designating Party) by the 60-day deadline that (1)

1 identifies (by category, where appropriate) all the Protected Material that was  
2 returned or destroyed and (2) affirms that the Receiving Party has not retained any  
3 copies, abstracts, compilations, summaries, or any other format reproducing or  
4 capturing any of the Protected Material. Notwithstanding this provision, Counsel are  
5 entitled to retain archival copies of all pleadings, motion papers, trial, deposition, and  
6 hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits,  
7 expert reports, and associated exhibits, attorney work product, and consultant and  
8 expert work product, even if such materials contain Protected Material. Any such  
9 archival copies that contain or constitute Protected Material remain subject to this  
10 Protective Order as set forth in Section 6.

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 Dated: December 22, 2016

By: /s/ Wallace Wu (with permission)

Wallace Wu (State Bar No. 220110)

wallace.wu@aporter.com

Marty Koresawa (State Bar No. 291967)

marty.koresawa@aporter.com

Allen Secretov (State Bar No. 301655)

allen.secretov@aporter.com

ARNOLD & PORTER LLP

777 South Figueroa Street

Los Angeles, California 90017

Tel: (213) 243-4000

Fax: (213) 243-4199

Matthew Wolf (*pro hac vice*)

matthew.wolf@aporter.com

Edward Han (*pro hac vice*)

ed.han@aporter.com

John Nilsson (*pro hac vice*)

john.nilsson@aporter.com

Marc Cohn (*pro hac vice*)

marc.cohn@aporter.com

ARNOLD & PORTER LLP

601 Massachusetts Ave, NW

Washington, DC 20001

Tel: (202) 942-5000

Fax: (202) 942-5999

*Attorneys for Plaintiffs*

1 Dated: December 22, 2016

By: /s/ Brian C. Horne

John B. Sganga, Jr. (SBN 116,211)

john.sganga@knobbe.com

Craig S. Summers (SBN 108,688)

craig.summers@knobbe.com

Christy G. Lea (SBN 212,060)

christy.lea@knobbe.com

Joshua J. Stowell (SBN 246,916)

joshua.stowell@knobbe.com

KNOBBE, MARTENS, OLSON & BEAR, LLP

2040 Main Street, 14th Floor

Irvine, CA 92614

Telephone: (949) 760-0404

Facsimile: (949) 760-9502

Brian C. Horne (SBN 205,621)

brian.horne@knobbe.com

10100 Santa Monica Blvd. Suite 1600

Los Angeles, CA 90067

Telephone: 310-551-3450

*Attorneys for Defendant*

16 FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.

18 DATED: January 3, 2017

19  
20 

21 GAIL J. STANDISH

22 UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

UNDERTAKING OF \_\_\_\_\_

I, \_\_\_\_\_, declare that:

1. My business address is \_\_\_\_\_.

2. My present occupation (including job title) is \_\_\_\_\_.

3. I am currently employed by \_\_\_\_\_.

4. My past and present business relationships with the party retaining my services include: \_\_\_\_\_.

5. I have received a copy of the Protective Order in *Boston Scientific Corporation v. Edwards Lifesciences Corporation*, Case No. 8:16-cv-0730-CJC-GJS, and have carefully read and understand its provisions.

6. I will comply with all of the provisions of the Protective Order. I will hold in confidence, will not disclose to anyone other than those persons specifically authorized by the Protective Order, and will not copy or use for purposes other than for this lawsuit, any information designated under the Protective Order, except as expressly permitted in the Protective Order. I agree to comply with and to be bound by all the terms of this Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt.

7. I agree to take reasonable steps to return or destroy and certify destruction of all materials designated under the Protective Order which come into my possession, and documents or things which I have prepared relating thereto, to

1 counsel for the party for whom I was employed or retained. I will do this  
2 immediately upon receiving a request from the counsel for the party for whom I was  
3 employed or retained or, in any event, by no later than thirty days after I have been  
4 notified that litigation between the parties has ended.

5 8. I accept full responsibility for taking measures to ensure that staff  
6 members working under my supervision comply with the terms of this Protective  
7 Order.

8 9. I hereby submit to the jurisdiction of and agree to appear before the  
9 United States District Court for the Central District of California for the purpose of  
10 enforcement of this Protective Order, even if such enforcement proceedings occur  
11 after termination of this action.

12  
13 I declare under penalty of perjury that the foregoing is true and correct.

14  
15 DATE: \_\_\_\_\_ SIGNATURE: \_\_\_\_\_  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28